

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES WILLIAM HOLMES,

Defendant-Appellant.

UNPUBLISHED

June 18, 1999

No. 203258

Washtenaw Circuit Court

LC No. 95-005103 FH

Before: Neff, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Defendant appeals by right his conviction for armed robbery, MCL 750.529; MSA 28.797, and his sentence of forty to sixty years' imprisonment. We affirm.

I

Defendant was convicted for his part in an early morning robbery of a convenience store. Testimony demonstrated that defendant spent the night before the robbery selling heroin and using the proceeds to supply himself and an accomplice with liquor and crack cocaine. When funds ran out defendant suggested the robbery, to which the accomplice agreed. The two men went to the home of defendant's ex-girlfriend where defendant took a large kitchen knife and secured a ride to the area of the convenience store.

Defendant's accomplice entered first, made a small purchase, and left. He soon reentered, claiming he had forgotten something, and defendant immediately followed him into the store. After both men asked questions that somewhat confused and distracted the clerk, defendant rushed behind the counter brandishing the knife and demanding money. The clerk handed defendant the contents of the register, while defendant's accomplice grabbed the lottery dispensers from the counter. As defendant told the clerk to open the safe, a task the clerk indicated was impossible due to a time lock, his accomplice observed vehicles including a police car pass by the store. Worried that the robbery was taking too long the men left, but not before defendant slashed at the clerk with the knife, threatening his life and accusing him of pushing an alarm.

Two officers on patrol immediately responded to the clerk's emergency call to the police. They observed and passed a car leaving a nearby parking lot. When the officers stopped the car the doors opened, and defendant and his accomplice fled on foot. Defendant's accomplice was captured a short time later.

Identified by his wallet and driver's license which were left in the getaway car, an arrest warrant was issued for defendant and he was picked up a few days later. In addition to the evidence found in the car, including the knife and lottery dispensers, defendant's involvement in the robbery was confirmed by his statement to the investigating officer. During his initial interview defendant apologized for his actions, indicating that his life had taken a recent downturn when he began using drugs again. The officer testified that defendant stated that his memory of the night was sketchy because he was high, but that defendant indicated he recalled riding in the car to the store and stumbling out, and that his next memory was of jumping from the car and running from the police. At one point in the interview defendant stated, "I know I did it, but I don't remember a lot about it."

At trial defendant secured his right to defend himself, but generally was unable to conform his motions and questioning to the court rules. He eventually proceeded primarily through his appointed counsel, whom the court had required to stay and advise. Defendant denied to the jury any involvement in the armed robbery.

II

Defendant argues that his trial counsel provided ineffective assistance. Specifically, defendant contends both that counsel failed to create a separate record ascertaining the validity of the victim's in-court identification and that counsel failed to take interlocutory appeal from the denial of a motion to quash.

Because defendant failed to move for a *Ginther* hearing¹ or a new trial based on ineffective assistance of counsel, our review is limited to mistakes apparent on the record. *People v McCrady*, 213 Mich App 474, 478-479; 540 NW2d 718 (1995). In reviewing an ineffective assistance of counsel claim we must determine whether defendant has shown that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy, and must also show a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

A

Defendant's first claim is that the victim's in-court identification of him was tainted by police contact with the victim between defendant's preliminary examination and trial. Defendant does not directly contest the admissibility and independent nature of this identification; rather, he challenges his

counsel's effectiveness in not objecting at trial and requesting a separate hearing to evaluate whether an independent basis for the in-court identification existed.

The record indicates that at defendant's preliminary examination the victim was unable to identify defendant as one of the two men who committed the robbery. At trial, however, the victim positively identified defendant as one of the armed robbers. On cross examination, defense counsel thoroughly explored the basis for this changed testimony. The victim acknowledged his failure, on two previous occasions, to identify defendant in court proceedings. The victim also conceded that his recollection likely deteriorated over time, and though denying any influence from the contact, admitted that talking to the police between proceedings was a partial basis for his new ability to identify the defendant.²

Although counsel did not request a separate hearing on the issue, the victim's credibility was effectively attacked during cross-examination. The questionable validity of the identification was further emphasized during defense counsel's closing argument. We find defense counsel's election to vigorously cross-examine the victim, in lieu of requesting a separate hearing, was a legitimate trial strategy that we will not second-guess. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Counsel took advantage of the opportunity to inform the jury of the circumstances of the victim's previous unsuccessful identifications, and we are satisfied that any error in the admission of the victim's in-court identification was harmless. See *People v Hampton*, 138 Mich App 235, 239; 361 NW2d 3 (1984). Consequently, defendant has shown neither that counsel's performance fell below an objective standard of reasonableness, nor that the representation so prejudiced him as to deprive him of a fair trial. *Pickens*, *supra* at 338.

B

Defendant's second contention is that counsel's failure to take interlocutory appeal from the denial of the defense motion to quash rendered counsel ineffective.³ Specifically, defendant contends that an interlocutory appeal of the bindover would have been successful because there was insufficient evidence of defendant's identity as one of the armed robbers and thus, but for counsel's alleged error, the result of the proceeding would have been different. See *Stanaway*, *supra* at 687-688. We disagree.

A defendant must be bound over for trial when competent evidence is presented at the preliminary examination constituting probable cause that a felony was committed and that the defendant committed it. MCL 766.31(1); MSA 28.931(1); MCR 6.110(E). We review de novo a circuit court's decision to grant or deny a motion to quash a felony information to determine if the district court abused its discretion in ordering bindover. *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998). "A district court's determination that sufficient probable cause exists will not be disturbed unless the determination is wholly unjustified by the record." *Id.*

In the present case, the district court was presented with evidence (1) that defendant's identification was found in a wallet in the car police stopped immediately after the robbery; (2) that two men were observed by police fleeing this car; and (3) that defendant's statements corroborated that he was at the convenience store and that he ran from the car. In denying defendant's motion to quash the

circuit court quoted these factual findings of the district court, and stated its agreement that they established probable cause. Defendant has failed to demonstrate that the courts' determinations were "wholly unjustified by the record," *Id.*⁴, and that defense counsel's failure to seek an interlocutory appeal on this issue was representation so prejudicial that it deprived defendant of a fair trial. *Pickens*, *supra* at 338. Consequently, his claim of ineffective assistance of counsel must fail.

III

Defendant's final claim is that the trial court abused its discretion by imposing a forty-year minimum sentence. We disagree.

Defendant's criminal history includes ten felony and five misdemeanor convictions over the course of over twenty-five years. These prior offenses include convictions for armed robbery and for assault with a dangerous weapon and possession of a short-barreled shotgun. Moreover, defendant committed the instant offense while on parole for a 1992 conviction of first-degree retail fraud.

The maximum sentence for armed robbery is life imprisonment. MCL 750.529; MSA 28.797. In light of defendant's lengthy criminal record, his repeated violations of parole, and the fact that the victim was threatened, both physically and verbally, with harm, we conclude that defendant's forty-year minimum sentence does not violate the doctrine of proportionality. See *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997) (where an habitual offender's criminal history demonstrates that he is unable to conform his conduct to the law, a sentence within the statutory limits is proportionate). Accordingly, defendant's sentence does not constitute an abuse of discretion. *People v Cervantes*, 448 Mich 620, 627; 532 NW2d 831 (1995).

Affirmed.

/s/ Janet T. Neff
/s/ Harold Hood
/s/ William B. Murphy

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

² Asked by defense counsel whether the police had "suggested to you that they caught the guy, they think it's him, so you should too," the victim's response was "[n]ot in those exact words."

³ Generally, an error in a magistrate's determination that sufficient evidence was presented at the preliminary examination to support a bindover is rendered harmless where, as here, sufficient evidence is presented at trial to sustain the defendant's conviction. *People v Parker*, 230 Mich App 677, 689; 584 NW2d 753 (1998).

⁴As noted by the district court in ordering the bindover, whether there was a reasonable doubt that defendant was one of the robbers was a factual question that remained for the jury.